An Update on Michigan's Medical Marihuana Act

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What is Marihuana?

- It is a psychoactive drug extracted from the plant Cannabis sativa.
- The herbal form of the drug consists of dried mature flowers and leaves of female plants.
- The resinous is known as hashish.
- The biological active ingredient is THC.





National Survey-Marihuana Use Increases

- In 2011, 18.1 million Americans were current users of marihuana, compared to 17.4 million in 2010.
- An increase rate of current marihuana use among youth aged 12 to 17, rose from 7.4% in 2010 to 7.9% in 2011.
- "Emerging research reveals potential links between state laws permitting access to smoked marihuana and higher rates of marihuana use." Gil Kerlikowske, Director of National Drug Control Policy.
- Source: Substance Abuse and Mental Health Service Administration (SAMHSA), September 8, 2011



Most Common Drugs at the MSP Laboratory (2012)

•	Drug	% of Cases	Drug	% of Cases
	THC	57	Clonazepam	2
	Alprazolam	16	Zolpidem	2
•	Hydrocodone	11	Cyclobenzaprine	1
•	Cocaine	6	Methamphetamine	1
	Morphine	8	Trazodone	2
	Soma	7	Fluoxetine	1
	Diazepam	6	Butalbital	1
	Diphenhydramir	ne 4	Phenobarbital	<1
	Codeine	4	Venlafaxine	1
•	Methadone	3	Sertraline	1
•	Amphetamine	3	MDMA	1
•	Citalopram	3	Fentanyl	<1
	Oxycodone	2	MDPV (bath salts)	1
	Tramadol	2		



Pharmageddon?

- 2011 4.2 Billion prescriptions filled
 - #1 Prescribed Drug Hydrocodone (Vicodin)
 - 131.2 million prescriptions
 - #11 Alprazolam (Xanax) 46.3 million
 - #15 Zolpidem (Ambien) 38 million
 - #17 Sertraline (Zoloft) 35.7 million
 - #19 Citalopram (Celexa) 32.1 million
 - #21 Oxycodone (Oxycontin) 31 million



Marihuana Potency

Average THC:

2008:10.1%

2007:7.3%

1983:<4%

A 50% concentration of THC can remain in the body up to 8 days after marihuana use.



Street Price

- \$6 a gram in 1981;
- \$18 a gram in 1991;
- \$10 a gram present;
- An ounce ranges from \$100-\$400 in the U.S.;
- \$200-\$700 in the Midwest;
- "Cocoa puff"-cocaine and marihuana; "Frios"-marihuana laced with PCP; "Fuel"-marihuana laced with insecticides; ""Geek"-crack and marihuana.





Federal Law

- The Federal Controlled Substance Act (CSA) classifies marihuana as a Schedule 1 drug, meaning that Congress recognizes no acceptable medical use for it, and its possession is generally prohibited.
- As a federal court in Michigan recently recognized, "It is indisputable that state medical marihuana laws do not, and cannot supersede federal laws that criminalize the possession of marihuana." *United States v. Hicks,* United States District Court, E.D. of Michigan, 2010.



Drug Enforcement Administration's Position-June 21, 2011

- Marihuana has a high potential for abuse.
- Marihuana has no currently accepted medical use in treatment in the United States.
- Marihuana lacks accepted safety for use under medical supervision.
- http://www.deadiversion.usdoj.gov/fed_regs/ rules/2011/fr0708.htm

D.C. Circuit Court of Appeals in *Americans for Safe Access v. Drug Enforcement Administration-* Decided January 22, 2013



What does the White House says about Legalizing Marihuana?

Gil Kerlikowske, U.S. "Drug Czar"

"Like many, we are interested in the potential marihuana may have in providing relief to individuals diagnosed with certain serious illnesses. That is why we ardently support ongoing research into determining what components of the marihuana plant can be used as medicine.

To date, however, neither the FDA nor the Institute of Medicine have found *smoked* marihuana to meet the modern standard for safe or effective medicine for any condition."



Michigan Public Health Code Law-Schedule 1 Drug

- Marihuana is classified as a Schedule 1 drug under the Michigan Public Health Code, MCL 333.7212.
- It is a Schedule 1 drug if the Michigan Board of Pharmacy:

"finds that the substance has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision."



Medical Marihuana Trends in USA By State

- 1996 California
- 1998 Alaska, Oregon & Washington
- 1999 Maine
- 2000 Colorado, Hawaii & Nevada
- 2004 Montana & Vermont
- 2006 Rhode Island
- 2007 New Mexico
- 2008 Michigan
- 2010 Arizona, DC & New Jersey
- 2011 Delaware
- 2012 Connecticut, Massachusetts



November 2012 Ballot Initiatives-Nationally

- Oregon- sought to legalize and regulate the cultivation, possession and sale of unlimited amounts of marihuana.
 Defeated 56% opposed 44% supported
- Colorado-initiative allows those 21 years of age and older to possess up to one ounce of marihuana and cultivate six marihuana plants. The initiative also allows for over-the-counter sale of marihuana, reduces penalties for larger possession charges and legalizes hemp farming. Passed- 55% supported 45% opposed.
- Washington- allows adults 21 and over to purchase marihuana from state-licensed and state-regulated businesses. Creates a regulatory system, much like the liquor control system, in which a board oversees licensing of marihuana producers, processors and retailers, and imposes an excise tax of 25% at each step. Passed 56% supported 44% opposed.



- **Kalamazoo** voted to allow 3 dispensaries. Vote was 13,569 in favor and 7,542 opposed.
- Grand Rapids 60% voted to make marihuana possession a \$25 civil infraction
- Flint and Detroit both passed laws to decriminalize the possession of less than 1ozof marihuana. In Detroit it passed by 65%.



Ballot Proposal #1 of 2008

- Permit physician approved use of marihuana by registered patients with debilitating medical conditions cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health (MDCH).
- Permit registered individuals to grow limited amounts of marihuana for qualifying patients in an enclosed, locked facility.
- Require the Michigan Department of Community Health ("MDCH") to establish an identification card system for patients qualified to use marihuana and individuals qualified to grow marihuana.
- Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marihuana as a defense to any prosecution involving marihuana.



- An applicant submits a Department of Licensing and Regulatory Affairs ("LARA") approved application, fee, copy of current photo ID and a physician certification to LARA
 - Fee is \$100 for patient or \$25 if receiving SSI, receiving full Medicaid benefits, or SSD
- LARA reviews and approves/denies application with 15 days of receipt.
- LARA issues registration card with 5 days of approval.
- The statute allows for a copy of the application submitted to serve as a valid registry identification card if the card is not issued within 20 days of its submission to LARA.



Changes in the Application Process-April 1, 2013

- Require an applicant for a registry ID card to submit proof of Michigan residency by providing a copy of driver license, State ID card, or voter registration
- Require LARA to issue a registry ID card within five business days of approving an application or renewal rather than within 5 days
- Provide that registry ID card would expire 2 years, rather than 1 year, after it was issued
- Authorize LARA to contract with a private entity to assist LARA in processing and issuing registry ID cards.



- LARA keeps a confidential list of the individuals to whom it has issued a card.
- Law enforcement can check if a registration number is valid through LEIN.
- Verifications can **ONLY** be given to law enforcement personnel.



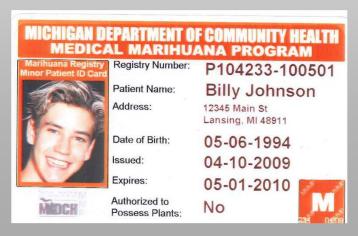
MCL 333.26426(h)(4)

- A person, including an employee or official of the department or another state agency or local unit of government, who discloses confidential information in violation of this act is guilty of a misdemeanor, punishable by imprisonment for not more than 6 months.
- Notwithstanding this provision, department employees may notify law enforcement about falsified or fraudulent information submitted to the department.

Identification Card System

LARA has established an identification card system for patients qualified to use Marihuana and individuals qualified to be primary caregivers.







Qualifying Patient

A person who has been diagnosed by a physician as having a debilitating medical condition.





- Applications received as of 12/31/2012
- **344,313** original and renewal applications received since April 6, 2009
 - 124,417 active registered qualified patients
 - > 25,957 active registered qualified primary caregivers patients
- 31,260 applications denied
 - Reason for denial typically is that application is incomplete missing photo; missing physician certification; application form incomplete; insufficient fee
 - Some denied because medical condition is not covered such as depression or high heel pain
 - Currently, LARA is processing valid original and renewal applications and issuing the registry identification cards within the 20 day statutory time period.



Physician's Role

- Only a physician (MD or DO) fully licensed in Michigan can make a valid written certification
- The certifying physician is not prescribing marihuana, a physician cannot do so.
- The physician is not recommending marihuana; the law does not require them to do so.
- The physician is only stating an "opinion" as to the likelihood of a medical benefit, and can do so under the law without any legal or professional liability, except that a physician is always subject to professional malpractice.



Written Certification

A document signed by a physician, stating the patient's debilitating medical condition and that in his/her professional opinion, the patient is likely to therapeutically benefit from the medical use of Marihuana.



Written Certification-April 1, 2013

The physician has completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation.





- (1) The physician has reviewed the patient's relevant medical records and completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation of the patient.
- (2) The physician has created and maintained records of the patient's condition in accord with medically accepted standards.
- (3) The physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marihuana as a treatment of the patient's debilitating medical condition.
- (4) If the patient has given permission, the physician has notified the patient's primary care physician of the patient's debilitating medical condition and certification for the use of medical marihuana to treat that condition.



Benefit of Participation in the Registry Identification Program

- A registered "Qualifying Patient" is allowed to possess an amount of marihuana that does not exceed 2.5 ounces of usable marihuana and allowed to cultivate 12 marihuana plants kept in an enclosed, locked facility.
- Either the Qualifying Patient or the Primary Caregiver can be allowed to possess the marihuana plants.
- A qualifying registered patient is protected from "arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau" for medicinal use or possession of marihuana.



What Does This Mean?

- The Michigan Medical Marihuana Act does not create any sort of affirmative *right* under state law to use or possess marihuana.
- The Act does not repeal any drug law contained in the public health code, and all persons in this state remain subject to them.
- The Act merely provides a procedure through which seriously ill people using marihuana can be identified and protected from prosecution under state law.

People v Nicholson, No. 306496 (Mich. App., June 26, 2012)

- The defendant was not immune from arrest because his application paperwork for a registry identification card under the MMMA was "not reasonably accessible at the location of his arrest."
 - However, because he possessed a registry identification card that had been issued before his arrest when being prosecuted, he was immune from prosecution unless there is evidence showing that his possession of marihuana at the time was not in accordance with "medical use" as defined in the MMMA or otherwise not in accordance with the MMMA.



 Require a qualifying patient or primary caregiver to present both his or her registry identification card and a valid driver license or government-issued photo ID card, in order to be protected from arrest.



Medical Use

The acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation or paraphernalia relating to the administration of Marihuana to treat or alleviate a registered qualifying patient's debilitating condition or symptoms. MCL 333.26423(e).

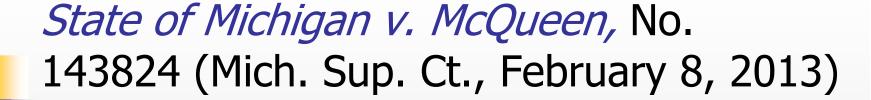


Marihuana Strains

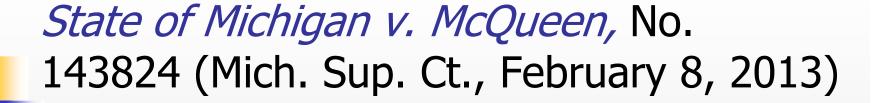
- Durban Poison
- Tangelo Haze
- Mental Haze
- LA Confidential
- Spirit of 76
- Banana Kush
- Hindu Skunk
- Grape Ape

- Bubba Kush
- Purple Cotton
- Razzle Dazzle
- Pink Lady
- Blue Diesel
- Green Crack
- FU Cali
- ESCOBAR





- Thus, § 4 immunity does not extend to a registered qualifying patient who transfers marihuana to another registered qualifying patient for the transferee's use because the transferor is not engaging in conduct related to marihuana for the purpose of relieving the transferor's own condition or symptoms.
- Similarly, § 4 immunity does not extend to a registered primary caregiver who transfers marihuana for any purpose other than to alleviate the condition or symptoms of a specific patient with whom the caregiver is connected through the MDCH's registration process."



- "In this context, the terms "using" and "administering" are limited to conduct involving the actual ingestion of marihuana. Thus, by its plain language, § 4(i) permits, for example, the spouse of a registered qualifying patient to assist the patient in ingesting marihuana, regardless of the spouse's status. However, § 4(i) does not permit defendants' conduct in this case.
- Defendants transferred and delivered marihuana to patients by facilitating patient-to-patient sales; in doing so, they assisted those patients in acquiring marihuana."



People v Green, No. 308133 (Mich. App., January 29, 2013)

- The Court held that "Unlike the sale of marihuana, the delivery or transfer of marihuana, absent the exchange of compensation, is specifically included in the MMMA's definition of 'medical use.'
- Thus, the circumstances present in this case are distinguishable from the circumstances in *McQueen*.
- Further, the MMMA does not place any restrictions on the transfer or delivery of marihuana between adult patients, and we decline to read any such restriction into the act."



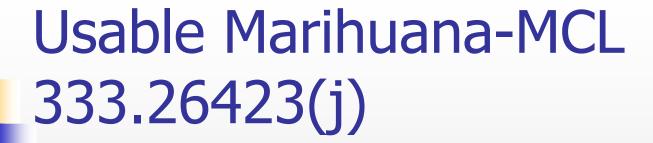
- "Medical marihuana provisioning center" or "provisioning center" means a commercial entity located in this state that acquires, possesses, cultivates, manufactures, delivers, transfers, or transports medical marihuana and sells, supplies, or dispenses medical marihuana to registered qualifying patients, directly or through the patients' registered primary caregivers.
- Provisioning center includes any commercial property where medical marihuana is sold to registered qualifying patients and registered primary caregivers.





Marihuana-MCL 333.7106

"Marihuana" means all parts of the plant Cannabis sativa L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin.



The dried leaves and flowers of the Marihuana plant, and any mixture or preparation thereof, but does not include the seeds, stalk, and roots of the plant. MCL 333.26423(j).





People v. Chason-Pointer, Genesee County Circuit Court, 1/13/11

Judge directed a verdict because the seeds and stems of 38 ounces of "marihuana" were not separated in order to show an amount that exceeded 2.5 ounces of "usable marihuana."

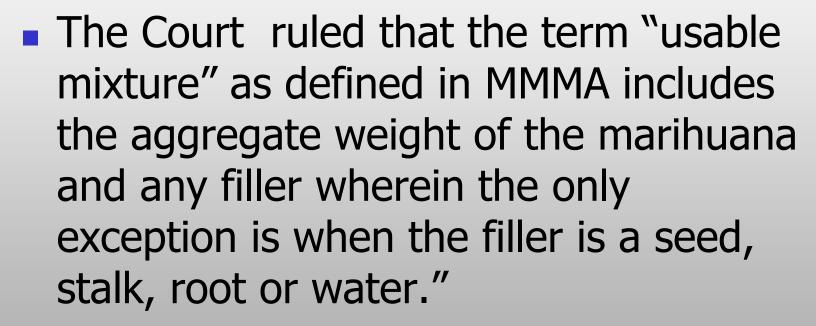




People v Chason-Pointer, No. 302795 (Mich. App., October 11, 2012)

- The plain language of § 4 indicates that a qualifying patient who possesses a registry identification card is immune from prosecution provided the qualifying patient possesses not more than 2.5 ounces of usable marihuana and not more than 12 plants.
- "Given the language of the statute, defendant was not entitled to immunity because the evidence clearly established that he possessed more than plants, regardless of whether he also possessed more than 2.5 ounces of usable marihuana."
- Therefore, its ruling did not constitute an acquittal.









Qualifications for Registered Primary Caregiver

The patient designates an individual as the primary caregiver on the patient's registration application form.

The primary caregiver shall:

- be 21 years old;
- have no felony convictions involving illegal drugs;
- agree to assist patient with medical use of marihuana.



Qualifications for Registered Primary Caregiver-April 1, 2013

- Revise the definition of "primary caregiver" to refer to a person who has not been convicted of any felony within the past 10 years
- Never been convicted of a felony involving illegal drugs or a felony that is an "assaultive crime" as defined in Michigan Compiled Law 770.9a



Possession, Cultivation, and Plant Limits for a Registered Primary Caregiver

- Not to exceed 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process. MCL 333.26424(b)(1).
- For each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. MCL 333.26424(b)(2).



People v. Redden, Concurrence

• "Because a primary caregiver may assist only the five or fewer qualifying patients to whom the caregiver is connected through the registration process, there is no circumstances under the MMMA in which the primary caregiver can provide assistance to any other qualifying patient, and receive compensation in exchange, without being subject to arrest and prosecution under the Public Health Code." Pages 13-14.



People v. Bylsma, No. 144120 (Mich. Sup. Ct., December 19, 2012)

- "Section 4 does not allow the collective action that defendant has undertaken because only one of two people may possess marihuana plants pursuant to §§ 4(a) and 4(b): a registered qualifying patient or the primary caregiver with whom the qualifying patient is connected through the registration process of the Michigan Department of Community Health (MDCH).
- Because defendant possessed more plants than § 4 allows and he possessed plants on behalf of patients with whom he was not connected through the MDCH's registration process, defendant is not entitled to § 4 immunity."
- However, "The Court of Appeals erred when it concluded that defendant was not entitled to assert the § 8 affirmative defense solely because he did not satisfy the possession limits of § 4."



Not Subject to Arrest

These primary caregivers shall not be subject to arrest, prosecution, or civil penalty or disciplinary action by a business or professional licensing board or bureau, for the medical use of Marihuana. MCL 333.26424(b).



What About the Plants?

- Michigan does not limit the size or distinguish between seedlings and mature, producing plants.
- 12 plants can produce quite a bit of marihuana. The annual yield of a 12 plant indoor marihuana grow site would generate between 44 and 72 ounces.
- Is a dead plant a plant? Is a cutting a plant? Is a clone a plant? Is a seedling considered a plant if it has a root system?
- It can be assumed that the primary caregiver is not legally allowed to keep part of the "harvest" as payment.



MCL 333.7401(5)

- "Plant" means a marihuana plant that has produced cotyledons or a cutting of a marihuana plant that has produced cotyledons.
- Webster's definition of cotyledon: A leaf of the embryo of a seed plant, which upon germination either remains in the seed or emerges, enlarges, and becomes green. Also known as a seed leaf.



Obtaining Medical Marihuana

The Act is silent on this issue.

The State of Michigan is not authorized to regulate growing sites or quality of product under this Act.





Enclosed, Locked Facility

A closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient. MCL 333.26423(c).





Michigan Attorney General's Position-June 28, 2011

The Attorney General opined that "The Michigan Medical Marihuana Act, prohibits the joint cooperative cultivation or sharing of marihuana plants because each patient's plants must be grown and maintained in a separate enclosed, locked facility that is only accessible to the registered patient or the patient's registered primary caregiver."





People v. King, Shiawassee Circuit Court, September 30, 2009

- Chain-link dog kennel behind the house, 6 feet tall, but had an open top and was not anchored to the ground.
- Marihuana plants growing inside defendant's unlocked living room closet.
- Defendant charged with two counts of manufacturing marihuana.
- Defendant asserted affirmative defense under Section 8 of the Act.
- Prosecutor argued that the Defendant failed to comply with the Act because marihuana plants not in an enclosed, locked facility.
- The Circuit Court agreed with the Defendant and dismissed the case.



People v. King, 9/30/09

The Shiawassee County Circuit Court ruled that "The Defendant was present at the time of the arrival of the police and he was there at the time the police searched the property. Therefore, the Defendant was acting as the security device by limiting access to the marihuana."



People v King, No. 294682 (Mich. App., February 3, 2011)

- "The kennel had a lock on the chain-link door, but had no fencing or other material over the top and it could be lifted off the ground."
- "Enclosed area" follows the word "closet" and "room," both of which have specific limited meanings and which have the common characteristic of being stationery and closed on all sides.



People v Keller, No. 304022 (Mich. App., May 10, 2012)

- Those plants joined all the others as being readily accessible to a member of defendant's family, or any passerby his dogs did not decide to treat as a foe.
- The statute's requirement that the facility be enclosed and locked indicates that access to them is to be secured by something more than the grower's withholding of permission to unauthorized persons to access them.



Language from People v. Kolanek, Michigan Supreme Court

- Footnote 45:
- "[T]o provide some guidance, we note that courts considering whether a defendant's plants were kept in an "enclosed, locked facility" should focus on whether the security device functions to "permit access only by a registered primary caregiver or registered qualifying patient." MCL 333.26423(c) (emphasis added)."



A closet, room, or other comparable, stationary, and fully enclosed area equipped with secured locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient. MCL 333.26423(d).





Enclosed, Locked Facility-Plants Grown Outdoors-April 1, 2013

- Not visible to the unaided eye from an adjacent property when viewed by an individual at ground level or from a permanent structure and are grown within stationary structure that is enclosed on all sides
- Conditional on where you live and not seen by the unaided eye-the exceptions would be for the base, by chain-link fencing, wooden slats, or a similar material that prevents access by the general public and that is anchored, attached, or affixed to the ground
- Located on land that is owned, leased, or rented by either the registered qualifying patient or the registered primary caregiver
- Equipped with functioning locks or other security devices restricting access only to the registered qualifying patient or the registered primary caregiver.



Enclosed, Locked Facility-Motor Vehicle-April 1, 2013

- The vehicle is being used temporarily to transport living marihuana plants from 1 location to another with the intent to permanently retain those plants at the second location
- An individual is not inside the vehicle unless he or she is either the registered qualifying patient to whom the living marihuana plants belong or the individual designated through the departmental registration process as the primary caregiver for the registered qualifying patient.



Transporting "Usable Marihuana"-in a Motor Vehicle-December 27, 2012

- Enclosed in a case that is carried in the trunk of a vehicle
- Enclosed in a case that is not readily accessible from the interior of the vehicle, if the vehicle in which the person is traveling does not have a trunk
- Misdemeanor-93 days or a fine of not more than \$500.00, or both.



In the Presence or Vicinity

"A person shall not be subject to arrest or prosecution, solely for being in the presence or vicinity of the medical use of marihuana, or for assisting a registered qualifying patient with using or administering marihuana." MCL 333.26424(i).



People v. Redden, Concurrence

- "Such assistance is in the nature of holding or rolling a marihuana cigarette, filling a pipe, or preparing marihuana-laced brownies for the qualifying patient suffering from a terminal illness or debilitating condition." Page 15.
- "Section 4(i) does not protect persons from arrest for acquiring, possessing, cultivating, manufacturing, delivery, transferring, or transporting marihuana on behalf of the qualifying patient." Page 15.



Seizure and Forfeiture

"Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited." MCL 333.26424(h).



No Probable Cause

The possession or application for a registry identification card does not constitute probable cause or reasonable suspicion and can not be used to support the search of the person or property of an individual who possesses or applies for a card, or otherwise subject the person to inspection by local, county, or state governmental agencies. MCL 333.26426(g).



People v. Anthony Brown, No. 303371 (Mich. App., August 28, 2012)

- The Court held "That to establish probable cause, a search-warrant affidavit need not provide facts from which a magistrate could conclude that a suspect's marihuana-related activities are specifically not legal under the MMMA."
- Defendant has presented no authority indicating that for probable cause to exist, there must be a substantial basis for inferring that defenses do not apply."



Custody or Visitation

A person shall not be denied custody or visitation of a minor for acting in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated. MCL 333.26424(c)



What Are Some Thoughts?

- Treat it like other medicines and keep it out of the reach of children!
- If cooking, clearly label any resultant food products as medicinal, and store them in a safe place, out of the reach of children!
- Use discretion when medicating and avoid doing so when children are present!
- Never operate a motor vehicle after medicating!



Criminal Section in the Act

- "Any registered qualifying patient or registered primary caregiver who sells marihuana to someone who is not allowed to use medical marihuana for medical purposes under this act shall have his or her registry identification card revoked and is guilty of a felony for not more than 2 years." MCL 333.26424(k)
- Effective, December 27, 2012-Class G felony against the public trust.





What is Prohibited Under MCL 333.2647(b)

- Smoking marihuana "in any public place"
- Smoking marihuana on any form of public transportation
- Any use by a person who has no serious or debilitating medical condition
- Operating, navigating, or being in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana
- Any use or possession in a school bus
- Any use or possession on the grounds of any preschool, primary, or secondary school
- Any use or possession in any correctional facility



Other Michigan Laws

MCL 333.26427(e) reads that:

"All other acts and parts of acts inconsistent with this act do not apply to the **medical use** of marihuana as provided by this act."



Operation of a Motor Vehicle

 Although the Act prohibits the operation of any motor vehicle while under the influence of Marihuana; it does not make reference to Michigan's current OUID Per Se Law.



Michigan Medical Marihuana Act



People v Koon, No. 301443 (Mich. App., April 17, 2012)

- The Court of Appeals held that "The MMMA does not provide a protection against prosecution for violating MCL 257.625(8)."
- The Court noted that "Driving is a particularly dangerous activity; Schedule 1 substances are considered particularly inimical to a drivers' ability to remain in maximally safe control of their vehicles; and the danger of failing to do so affects not only the driver, but anyone else in the vicinity."



People V Feezel, No. 138031 (Mich. Sup. Ct., June 8, 2010)

- The Court ruled that 11-Carboxy-THC ("TCOOH") is not a derivative of marihuana.
- In doing so, the *Feezel* Court removed 11-Carboxy-THC ("TCOOH") from the list of Schedule 1 "controlled substances" that can be considered under MCL 257.625(8).



OUID LAW in Michigan

- If any amount of a schedule one controlled substance (e.g. marihuana) or cocaine in body, the Prosecutor does not need to prove that suspect was under the influence or impaired. MCL 257.625(8). If it is not a schedule one or cocaine, the Prosecutor must prove operating under the influence or impaired. MCL 257.625(1).
- 11-Carboxy THC ("TCOOH") is not a schedule 1 controlled substance -- the prosecution can not charge a defendant for OUID Per Se if the defendant only has 11-Carboxy THC ("TCOOH") in his/her system. *People v. Feezel*, No. 138031 (Mich. Sup. Ct., June 8, 2010).



The Importance of THC Hour 1

- Scientific studies show that a person smoking marihuana often has 50-80 nanograms of THC in their blood after their last puff
- 30 minutes later, that level can drop to 15-16 nanograms-an 80% drop in THC.
- 1 hour later after the last puff, the level likely drops to 5-6 nanograms.
- THC levels can then drop to 2-3 nanograms after 90 minutes, trickiling off over a few



Estimated Duration of Effects of Marihuana

- Peak: 10 30 minutes after last consumption (smoking*)
- Duration: 2 3 hours
- Dissipates: 3 ^ hours
- Residual Effects: Up to 24 hours (showing as inactive metabolite, carboxy-THC)
- *If consumed in an edible form, the "high" takes longer to reach peak, and duration is longer.



General Indicators of Marihuana Consumption and Impairment

- Odor of marihuana
- Relaxed inhibitions
- Marked reddening of the conjunctiva (whites of the eyes)
- Body tremors
- Disorientation
- Eyelid tremors
- Impaired perception of time and distance
- Marihuana debris in or around the mouth
- Raised taste buds

NHTSA Impaired Driving Programs

Drug Evaluation & Classification Program







Advanced Roadside Impaired Driving Enforcement











Standardized Field Sobriety Testing



Statutory Affirmative Defense-Section 8

MCL 333.26428(a) states that "Except as provided in Section 7, a patient and a patient's primary caregiver, if any, may assert, the medical purpose for using marihuana as a defense to any prosecution involving marihuana."



Evidentiary Hearing

Pursuant to MCL 333.26428(a)(3), "A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a)."



Element #1 Under Section 8: Physician's Statement

A physician (Licensed M.D./D.O.) has stated that:

- In the physician's professional opinion
- After having completed a full assessment of the patient's medical history and patient's medical condition
- Which assessment was made in the course of a bona-fide physician-patient relationship
- That the patient is likely to receive therapeutic or palliative benefit
- From the medical use of marihuana
- To treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.



Element #2 Under Section 8: Reasonably Necessary Quantity

The patient and the patient's primary caregiver, if any, were collectively:

- In possession of a quantity of marihuana that was:
- Not more than was reasonably necessary
- To ensure the uninterrupted availability of marihuana
- For the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.



Element #3 Under Section 8: Medical Use

The patient and the patient's primary caregiver

- Were engaged in the:
- Acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana
- To treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.



People v. Redden, No. 295809 (Mich. App., September 14, 2010)

- The ballot proposal explicitly informed voters that the law would permit registered and unregistered patients to assert medical reasons for using marihuana as a defense to any prosecution involving marihuana."
- "We hold that the district court did not err by permitting defendants to raise the affirmative defense even though neither satisfied the registry-identification-card requirement of section 4." Page 11.



People v. Redden, No. 295809 (Mich. App., September 14, 2010)

- "The MMMA does not define the phrase bona fide physician-patient relationship."
- "We find that there was evidence in this particular case that the doctor's recommendations did not result from assessments made in the course of bona fide physician-patient relationships."
- "Indeed, the facts at least raise an inference that defendants saw Dr. Eisenbud not for good-faith medical treatment but in order to obtain marihuana under false pretenses."



People v. Redden, Concurrence

- Whether the physician signing the written certification form is the patient's primary caregiver;
- Whether the patient has an established history of receiving medical care from that physician;
- Whether the physician has diagnosed the patient with a particular debilitating medical condition;
- Whether the physician has been paid to sign the written certification;
- Whether the physician has a history of signing an unusually large number of such certifications.



People v. Redden, Concurrence

- Footnote 20, page 15:
- "It is beyond question that 100, 500, 1,000 terminally ill patients, with a 10 minute examination, has not been acting pursuant to bona fide physician-patient relationship."
- "A revolving-door rubber-stamp, assembly line certification process does not constitute activity in the course of a bona fide physicianpatient relationship."



People v. Kolanek, and People v. King, Nos. 142712 and 142695 (Mich. Sup. Ct., May 31, 2012)-Holding #1

Persons who do not qualify for immunity under §4 (whether because unregistered at the time or because in possession of too much marihuana or not in an enclosed locked facility) may still raise a §8 defense that their possession of marihuana was for medical purposes; the §4 factors need not be shown to have a valid affirmative defense under §8.



Nos. 142712 and 142695 (Mich. Sup. Ct., May 31, 2012)-Holding #2

A defendant who moves for dismissal of criminal charges under §8 must raise the defense in a pretrial motion and evidentiary hearing, and has the burden of proof at the hearing; the §8 defense may not be raised for the first time at trial.



Nos. 142712 and 142695 (Mich. Sup. Ct., May 31, 2012)-Holding #3

The defendant is entitled to dismissal of criminal charges if at the hearing he establishes all the elements of a §8 defense, including a statement from a physician in the course of a bona fide physician-patient relationship.



Nos. 142712 and 142695 (Mich. Sup. Ct., May 31, 2012)-Holding #4

 The physician's statement must have been obtained after enactment of the MMMA but before the commission of the offense.



Nos. 142712 and 142695 (Mich. Sup. Ct., May 31, 2012)-Holding #5

If there are no questions of fact and no jury could reasonably find a §8 defense, the motion to dismiss must be denied and the defendant may not present the §8 defense to the jury.



People v. Hinzman, Nos. 308909-308910 (Mich. App., July 24, 2012)

The Court of Appeals held, in pertinent part, that defendants could not establish that the amount of marihuana they possessed was not more than "reasonably necessary" to provide uninterrupted availability.



People v. Brian Bebout Reed,

No. 296686 (Mich. App., August 30, 2011)

- The Defendant's marihuana plants were discovered before any physician authorization, but defendant was not arrested until after he had obtained physician authorization, as well as a registry identification card from the Michigan Department of Community Health (MDCH).
- The Court held that "That, for a Section 8 affirmative defense to apply, the physician's statement must occur before the purportedly illegal conduct."



People v. Archie Kiel, No. 301427 (Mich. App., July 17, 2012)

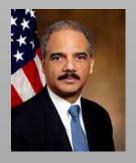
The following *dicta* language from the opinion:

"The fact that these individuals were registered with the state as medical marihuana users is prima facie evidence of the first and third elements." (p. 6).



Department of Justice's Position-October 19, 2009

- The Department of Justice put forth new legal guidelines.
- Prosecutors will be told "It is not a good use of their time to arrest people who use or provide medical marihuana in strict compliance with state law."





Department of Justice's Position-June 29, 2011

- The Department of Justice clarified its previous
- The Department's position in October 2009 "was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law."



ATF Open Letter-9/21/11

"Any person who uses or is addicted to marihuana, regardless of whether his or her State has passed legislation authorizing marihuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, is prohibited by Federal law from possessing firearms or ammunition."







Michigan Medical Marihuana Act



Legal Issue #1

Is a "visiting qualifying patient" with a card from another state limited to possessing the amount listed under the Act, or can they possess what is allowed under their own state law?



MCL 333.26424(j) of the Act

- It provides that another state's marihuana card "shall have the same force and effect as a registry identification card issued by the department."
- It should be noted that Michigan recognizes CPL permits from other states, however, it requires out of state CPL permit holders to comply with the restrictions stated in Michigan law.



Legal Issue #2

Can an employer discipline/terminate an employee for using medical marihuana?





MCL 333.26427(c)2 of the Act

- Nothing in this act shall be construed to require:
 - (2) An employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana."
- It is suggested that employers should adopt employment policies addressing how the medical use of marihuana will be treated by the employer. See also, Maricopa County Attorney Opinion, May 26, 2011.



Casias vs. Wal-Mart, U.S. District Court, decided February 11, 2011

- Civil case in Calhoun County which Wal-Mart fired an employee who tested positive for marihuana which he used while off-duty.
- The Court ruled that the "state's medical marihuana law protects users from arrest, but not employers' policies that ban the use of the drug."





Cassias vs. Wal-Mart, U.S. Court of Appeals, 6th Circuit, decided September 19, 2012

The Plaintiff, Casias, cannot sue the company for violation of the Michigan Medical Marihuana Act because the law does not regulate private employment."





Public Act 481, Effective, 12/18/12

- It specifies that an automobile insurance company would not be required to provide coverage under personal (injury) protection insurance (PIP) benefits for the medical use of marihuana or for expenses related to that use.
- It specifies that an employer, under the worker's compensation law, would not have to reimburse, or cause to be reimbursed, for charges for medical marihuana treatment.



Legal Issue #3

Can an individual cultivate, distribute, or possess medical marihuana if he/she lives in a school zone?



Drug Free School Zone

- Neither a patient nor their caregiver can cultivate, distribute, or possess marihuana within the federal 1000-foot Drug Free School Zone.
- MCL 333.7410(4)-An individual 18 years of age or over who violates section 7403(2)(a)(v)(d) by possessing a marihuana on or within 1,000 feet of school property or a library shall be punished by a term of imprisonment or a fine, or both, of not more than twice that authorized by section 7403(2)(a)(v)(d).



Does a qualifying patient or primary caregiver have to maintain the plants at their primary residence or can it be a secondary location?



No Requirements

There is no requirement that a qualifying patient or primary caregiver maintain the plants at their residence. Where the individual maintains the plants may eventually be limited by zoning laws, the Michigan Medical Marihuana Act, and federal law.



What about an individual who is on probation or parole?



Parole and Probation

MCL 771.3 reads:

- During the term of his or her probation, the probationer shall not violate any criminal law of this state, the United States, or another state or any ordinance of any municipality in this state or another state."
- Midland and Macomb County Circuit Courts has ruled that probationers/defendants are not allowed the use of medical marihuana while on probation.
- For those individuals who are on supervised release, parole, or probation, a sentencing court can order that this individual not be allowed to use or possess medical marihuana.



• What is the process to revoke a patient or caregiver's registry identification card if convicted for selling marihuana under 4(k) of the Act?



MCL 333.26424(k) of the Act

- It is unclear as to how long the revocation will last.
- It only revokes a patient's card for selling marihuana, and not for selling other drugs.
- LARA will not revoke a patient or caregiver's card when that individual is placed on probation or parole when there is condition of probation that prohibits the possession/use of marihuana.



Does the Act's prohibition against smoking medical marihuana in a public place apply to public places such as food service establishments, motels, hotels, or apartments?



- "Prohibits qualifying registered patients from smoking marihuana in the public areas of food service establishments, hotels, motels, apartment buildings, and any other place open to the public."
- "An owner of a hotel, motel, apartment building, or other similar facility can prohibit the smoking of marihuana and the growing of marihuana plants anywhere within the facility, and imposing such a prohibition does not violate the Michigan Medical Marihuana Act."



• Whether a law enforcement officer who arrests a patient or primary caregiver registered under the MMMA must return marihuana found in possession of the patient or primary caregiver upon his release or her release from custody?



Michigan Attorney General-11/10/2011

- "Section 4(h) of the MMMA is preempted by the CSA to the extent it requires law enforcement officers to return marihuana to registered patients or caregivers. As a result, law enforcement officers are not required to return marihuana to a patient or a caregiver."
- By returning marihuana to a registered patient or caregiver, a law enforcement officer is exposing himself or herself to potential criminal and civil penalties under the CSA for the distribution of marihuana or for aiding or abetting the possession or distribution of marihuana."

The Act does not . . .

Treat marihuana as a medicine or even as a food.

- No guidelines for processing.
- No purity requirements or standardization of ingredients.
- No potency requirements.
- No hygienic requirements.
- No requirements for herbicide/pesticide use.
- No research on therapeutic properties.
- No information on drug-drug or drug-disease interactions.
- Limited information on delivery methods.
- Limited information on cumulative effects.



Future Concerns are now Concerns

- Profiteering
- Regulating/prohibiting medical Marihuana dispensaries through ordinances
- Exposure to federal prosecution
- Medical marihuana in jails
- Defendant on probation/parole
- Children's day care centers
- Adult foster care homes and nursing homes
- Federal subsidized housing
- Colleges and universities
- School zones
- Work-place
- Concealed Pistol License (CPL)